Supreme Court, U.S.
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No. 87-649

In The
Supreme Court of the United States
October Term, 1987

CITY OF ANN ARBOR, EDWARD PIERCE and WILLIAM CORBETT,

Petitioners,

v.

KAREN CHRISTY, Individually and as sole shareholder of UNIQUE CREATIONS, INC.,

Respondents.

PETITIONERS' REPLY BRIEF REGARDING PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE CITY ATTORNEY

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ARGUMENT

I The Petition for Certiorari Was Not Premature.

Respondent has suggested that it would be premature to grant a writ of certiorari because the Court of Appeals merely reversed the District Court's denial of a preliminary injunction and remanded the matter for further proceedings. Certainly, it is good judicial policy to refrain from considering appeals of a lower court's discretionary rulings concerning interlocutory matters. However, this Court has not been hesitant to consider appeals prior to final judgment where important public policy questions need resolution or where resolution of the issue is necessary for proper consideration of the matter by the lower court. See *United States v. Nixon,* 418 U.S. 683, 41 L Ed 2d 1039, 94 S. Ct. 390 (1974).

Young v. American Mini-Theaters, 427 U.S. 50, 49 L Ed 2d 310, 96 S. Ct. 2440 (1976), was an appeal from the Sixth Circuit Court of Appeals decision which reversed the District Court's order granting a motion for summary judgment. Instead of requiring further proceedings by the District Court, this Court granted certiorari and reversed the decision of the Court of Appeals. Had a trial or other District Court proceedings been required prior to the issuance of a writ of certiorari, they would have to have been based on a constitutional interpretation exactly opposite that ultimately reached by this Court.

But for the fact that respondents appealed prior to the time the City could file a motion for summary judgment, this case is in almost the same posture as the *American Mini-Theaters* case was. If this case is remanded to the District Court prior to review by this Court, the hearing on the application for preliminary

injunction and the trial on the permanent injunction will have to be based on what Petitioners urge is a completely incorrect interpretation of the law. If the trial court is to obey the order of the Court of Appeals, it must reach its decision on whether there is an unconstitutional restriction on speech while totally ignoring the fact that the ordinance in question allows any retail business to stock and sell up to 20% of the "adult" materials in question.

In addition, if the opinion of the Court of Appeals is followed by the Trial Court, it will have to shift the burden to the City to "justify" its ordinance if an affidavit or other proof is presented showing that there is limited geographical area in Ann Arbor where businesses dealing only in "adult" materials can locate.

As a matter of public policy, the effect of the Court of Appeals decision on other courts and other cities cannot be ignored. In its present posture, this case has the potential of at least two more Court of Appeals' decisions before entry of a "final" judgment. In the meantime, other courts and other cities will be guided by a decision that simply is not warranted by the Constitution. Cities which clearly have no intention to suppress the speech involved in "adult" materials will be led to believe that the only way to accommodate the need for such materials is through an unlimited number of "adult bookstores."

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RELIEF

Petitioners respectfully request that this Court grant a writ of certiorari to consider the issues raised in the petition.

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February 5, 1988